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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1486

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA,

Petitioners,

v.

COUNTY OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT COUNTY OF HAWAII IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT COUNTY OF HAWAII IN OPPOSITION

Respondent COUNTY OF HAWAII ("Respondent") prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii by Petitioners Joseph Yuki Sotomura and Grace Fumiye Sotomura in this cause be denied.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii ("the court below") is appended to the Petition for a Writ of Certiorari. (Petition's App. 8) The opinion was delivered on December 11, 1973, and the Petition for Rehearing denied on December 28, 1973. (Petition's App. 29)

JURISDICTION

Respondent questions the jurisdiction as set forth in the Petition for the reason that there is no final judgment as required under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the court below's Judgment on Appeal issued on January 7, 1974 remanding the case to the Court of the Third Circuit, State of Hawaii ("the trial court") for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line meets the requirement of finality of judgment imposed by 28 U.S.C. §1257(3).

2. Whether the establishment by the court below of a seaward boundary line in a condemnation case in conformance to an earlier court below's decision constituted a taking of property without just compensation.

3. Whether the court below by failing to give res judicata effect to the Land Court Decree resulted in a denial of due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1

"No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Hawaii Revised Statutes ("HRS") Chapter 501, Land Court Registration, sections 501-1, 501-28, 501-45, 501-51, 501-63, 501-71, 501-74, 501-75, 501-81, 501-82, 501-85, 501-87, 501-88, 501-186, Vol. 7 at pages 4-41, and Vol. 7 (Supp. 1973) at pages 2-10. Each section is reproduced in full in the Appendix to the Petition, (Petition's App. 33-38), except for section 501-63 which is reproduced in Respondent's Appendix (App. 1).

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct and Respondent accepts said statement except those portions inconsistent with the statement hereinafter stated.

The Land Court Decree of Registration and Owner's Certificate of Title described the seaward boundary of the subject land. There were no findings of fact that siad boundary was fixed with approval of the state surveyor nor in accordance with established practice nor the location of high-water mark was *fixed* along the seaward line.[1]

The Defendant's memoranda referred to on page 5 of the Petition did not argue that the decree of registration issued by the Land Court was res judicata as to the means of locating high-water mark as the boundary, but instead argued that the high-water mark as described in the said decree of registration was conclusive and not subject to change.[2]

The ruling of the court below was not unpredictable and the rule of law applied in the instant case was the same as that used by the Land Court, i.e., to determine the high-water mark to ascertain the seaward boundary of ocean front land.[3]

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE CASE.

The decision of the court below is not final. 28 U.S.C. §1257, states:

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[1] Relating to statement on pages 4 and 5 of Petition.

[2] Relating to statement on page 5 of Petition.

[3] Relating to statement on page 7 of Petition.

"*Final* judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari. . . ." (emphasis added)

The jurisdiction of the United States Supreme Court is limited to *final* judgments or decrees rendered by the highest court in the state in which a decision could be had. The finality requirement has been imposed since the Judiciary Act of 1789, §25, 1 Stat. 73, 85, and is designed to avoid the evils of piecemeal review. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L.Ed. 1212 (1948). Furthermore, it is founded upon "consideration generally applicable to good judicial administration." *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L.Ed. 2092 (1945).

The decision by the Hawaii Supreme Court in this case is not final and unlike the decision in *Radio Station WOW Inc. v. Johnson, supra*, the purpose for which the case has been remanded to the trial court may raise additional federal issues. The Hawaii Supreme Court remanded the case to the judge of the trial court to determine the boundary along the vegetation line.[4] As recognized by the petitioners, the property involved in the eminent domain action is subject to erosion. It has been some four years since the date of summons, and, therefore, the establishment of the vegetational line could hardly be referred to as ministerial but rather requiring the testimony of surveyors and individuals who knew of the existence of the line in 1970. Therefore, the location of the vegetation line requires a finding of fact by the trial court which may raise

[4] Judgment on Appeal, Petition's App. 30.

federal issues which this court may again be asked to determine.

In *Republic Natural Gas Co. v. Oklahoma, supra,* the Oklahoma Supreme Court sustained the order of the State Corporation Commission, directing the appellant to take gas ratably from another producer in the same field. This court dismissed the appeal for want of a final jurisdiction, holding:

> "... On the other, in an eminent domain case, as in a case like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation ... Another similarity between this case and the condemnation cases calls for abstention until what is organically one litigation has been concluded in the state. It is that the matters left open may generate additional federal questions." *Republic Natural Gas Co. v. Oklahoma, supra,* at 71.

This court has earlier established the standard to be applied in determining the finality of the judgment. "And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court ... directed." *Department of Banking v. Pink,* 317 U.S. 264, 267, 63 S. Ct. 233, 87 L.Ed. 254 (1942). This court went on to hold that the test today is whether the order of the appellate court has in fact fully adjudicated the rights and that the adjudication is not subject to further review by a state court.

The application of the standard enunciated by this court to the factual situation of the case at bar leaves no alternative but to deny jurisdiction. The litigation has not been ended since the trial court must determine the location of the vegetation line subject to appeal and

review by the court below. If this court grants the Petition for the Writ of Certiorari, it may again be asked to review the court below's decision on the location of the vegetation line. The fragmented appeal is precisely the apprehension that the justices of this court expressed in *Republic Natural Gas Co. v. Oklahoma, supra.*

Because there remains more to be done by the trial court than the ministerial act of entering the judgment of the court below, because the decision of the court below has not in fact fully adjudicated the rights of the parties, because the judgment of the trial court is again subject to review by the court below, and because the matters left open may generate additional federal questions, a final judgment has not yet been rendered and, therefore, this Honorable Court has no jurisdiction over the case.

II.

ESTABLISHMENT BY THE COURT BELOW OF A SEAWARD BOUNDARY LINE DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS.

A. Property rights governed by state law.

The Tenth Amendment to the United States Constitution states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is well established that as a matter of a general proposition that the law of real property is, under our

Constitution, left to the individual states to develop and administer. *Sunderland v. U.S.*, 266 U.S. 226, 45 S. Ct. 64, 69 L.Ed. 259 (1924). Likewise, property rights as to title to riparian[5] lands within each state's borders are left to the respective states. *Bonelli Cattle Company v. Arizona*, 94 S. Ct. 517, 523 (1973). The Court in *Arkansas v. Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L.Ed. 638 (1917), stated:

> "... it is for the State to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian land adjacent to them...." (*Ibid.* 246 U.S. at 176, 38 S. Ct. at 305.)

The general proposition is only subject to regulations pertaining to the navigability of navigable waters and to rights accrued from federal patents granted prior to the entrance of the state into the Union. *Hughes v. State of Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967); *Bonelli Cattle Company v. Arizona, supra.* However, these cases, although holding that questions of ownership of land conveyed by the United States prior to statehood was governed by federal law, recognize, by the very essence of carving an exception, that normally the laws of real property are governed by the laws of the state within which the property is located.[6]

In the case of *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1876), this court held and accepted on the issue of the applicability of state law to title of riparian proprietors on the banks of the Mississippi that the local law was to govern the case. In that case, similar to the case at bar, the state law held that title of riparian

[5] Riparian and littoral are used interchangeably herein.

[6] Conflict of laws is not a problem here as the question was never raised in the court below.

owner extends only to the high water mark and that the area between the high and low water mark, as well as the bed of the river, belongs to the state.

The subject riparian land in the instant case was never owned and conveyed by the federal government prior to Hawaii being admitted into the Union, therefore, the laws of the State of Hawaii shall determine what rights apply to the subject riparian land.

B. Seaward boundary line of riparian land is governed by the rule stated in In Re Application of Ashford[7] and application of said rule does not constitute a taking of petitioners' property.

Prior to 1968, the Hawaii Supreme Court had no occasion to rule on the issue regarding the location of the seaward boundary line of riparian lands situated within the borders of said state. Its first opportunity came in the case of *In Re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968).

In that case, the makai[8] boundary or boundary located next to the sea was described in the royal patent as running "ma ke kai."[9] The Hawaii Supreme Court decided that ma ke kai is along the *upper reaches of the wash of waves*, usually *evidenced by the edge of vegetation or by the line of debris.*

The *Ashford* case finally determined the rule of law to be applied in locating the "high water mark" which becomes the seaward boundary of riparian land between the State and the private landowner.[10]

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[7] 50 Haw. 314 (1968).

[8] Hawaiian term meaning towards the ocean.

[9] Literally translated meaning along the sea.

[10] The court below's opinion, Petition's App. page 13.

In the case at bar, the seaward boundary is described as ". . . . along the seashore in all its windings *along high water mark*. . . ."[11] (emphasis added) The court below determined according to state law that high water mark is the same as the upper reaches of the wash of waves as described in *Ashford, supra.* Clarifying the rule announced in *Ashford,* the court below recognized that where the high water mark is evidenced by both a debris and vegetation line, the upper reaches of the waves is located at the vegetation line since it may be further inland during one season than during other seasons. It further recognized that whereas the debris line may fluctuate from day to day, the vegetation line is a more permanent monument, since the vegetational growth is limited by the year's highest wash of the waves.[12] Hence, the court below merely clarified the established real property law in the State of Hawaii by applying a previous decision to the facts of this case.

Petitioners allege that the court below's decision effectually confiscated their property without just compensation. Petitioners argue that prior to the court below's decision in the instant case, the "rule of law" in the State of Hawaii concerning seaward boundaries of riparian land within said sate had been clearly defined by established practice. Petitioners cite as authorities, opinions of the Attorney General of Hawaii prior to statehood and actions and decisions by the State of Hawaii's Land Court, over which the court below has appellate jurisdiction.[13]

The court below, having such appellate jurisdiction, is not bound by the Land Court's rulings. The court

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[11]The court below's opinion, Petition's App. 9.

[12]*Ibid,* Petition's App. 13.

[13]Section 501-63, Hawaii Revised Statutes.

below, being the State's court of last resort, has the final authority in the pronouncement of the rule of law applicable to any situation. *Calaf v. Gonzales*, 127 F.2d 934 (1st Cir. 1942).

Petitioners urge that language in the cases of *Hughes v. Washington*, *supra*, and *Bonelli Cattle Co. v. Arizona*, *supra*, support their contention that application of *Ashford* resulted in a confiscatory taking of their property. The facts of both cases are significantly different from those of the instant case. In both, the riparian land in question was originally owned by the federal government for which a land patent was issued to a private owner. Said property was soon included within the borders of the state. The question arose as to the ownership of lands accreted to the original land patent after the respective states declared that all accreted lands belong to the state. It should be noted that the federal common law recognized that accreted lands belonged to the riparian land owner, and consequently, this Court ruled that federal common law applied and the respective states could not take those lands without just compensation.

The instant case presents a clearly different situation. No federal land patent is involved and federal common law is not applicable, and consequently, as discussed earlier, state law will govern the situation.

Because the Hawaii law relating to the establishment of boundaries of littoral landowners has been expressed with sufficient clarity by a line of decisions, this court is bound to recognize the asserted state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, L. Ed. 1188, 58 S. Ct. 817 (1938). Furthermore, since the enunciated law of the State of Hawaii is and has always been that the boundary of littoral owners was a meandering line established by the *high water mark* and the Supreme Court of Hawaii merely defined the high water mark, there was no taking involved.

C. Petitioners have not been denied the opportunity to be heard.

Petitioners contend that the boundary line along the sea should be that of the limu line[14] (seaweed line) as allegedly applied by the Land Court. This position was clearly argued by Petitioners in the trial court.[15] Likewise, the Respondent argued that the *Ashford* line should be applied, i.e., debris line. Petitioners did not consent nor agree to Respondent's position. Instead, Petitioners argued vehemently against Respondent's contention that the *Ashford* standard should be applied.

The court below rejected Petitioners' position nor did it accept Respondent's position completely. The court below applied the *Ashford* standard using the vegetation line. As stated in *Ashford:*

> "... along the upper reaches of the wash of waves, usually evidenced by the *edge of vegetation* or by the line of debris left by the wash of waves, ..." (emphasis added) (*Supra* at 315)

The court below did not raise any new issue and Petitioners had the opportunity to argue against the application of *Ashford.* The basic issue before the court below was whether the standard as pronounced in *Ashford* is to be applied to registered land, a portion of which has been subject to erosion. Clearly, this issue was argued by the Petitioners and Respondent, and having had that opportunity, Petitioners cannot now complain.

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[14] See, Petition, page 5, footnote 6.

[15] Rec. Doc. 10.

III.

THE DOCTRINE OF RES JUDICATA DOES NOT PRECLUDE APPLICATION OF THE ASHFORD RULE.

The doctrine of res judicata is a matter of state law, resting largely within the discretion of the court.[16] In the absence of an indication of any purpose on the part of a state to evade a prior decision of the Supreme Court of the United States in a state litigation, principles of finality protecting the parties to the litigation are, within the broad limits of fundamental fairness, solely the concern of state law. *Konigsberg v. State Bar of California*, 366 U.S. 36, 44, 81 S. Ct. 997, 1003, 6 L.Ed.2d 105 (1961).

The court below did not reject the application of res judicata to the Land Court decree, however, said court recognizing the effect of res judicata declared that a registered land is subject to the same burdens and incidents as unregistered land, including erosion.[17] The court below further stated that the precise location of the high-water mark on the ground is subject to change.[18]

Petitioners appear to allege that the Land Court decree conclusively determined the procedure that must be used when the seaward boundary of registered land is subsequently altered by erosion. Respondent is not in accord with this position.

The Land Court decree describing the seaward boundary of the litigated parcel states:

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[16]This not contested by Petitioners as stated in the Petition, page 16.

[17]The court below's opinion, Petition, App. 12. This position is also not contested by Petitioners. Petition, page 7, footnote 14.

[18]*Ibid*, Petition, App. 12.

"... to a Δ cut in pahoehoe at *high water mark* at seashore:

Thence following along the seashore in all its windings along *high water mark*, the direct azimuths and distances between points at *high water mark* for the next four courses being:

12. 338° 50' 30" 538.24 feet to a spike;

13. 25° 17" 411.24 feet to a spike;

14. 56° 05' 610.84 feet to a spike;

15. 60° 44' 340.38 feet to the point of beginning [a pipe] and containing an area of 5.314 acres."
(emphasis added)

It is significant to note that the basic reference point is the "high water mark." Thus, the Land Court determined that the seaward boundary should be measured by looking to the high water mark, although said court did not define what it meant by the high water mark. At the time of its decision, there was nothing definitive in Hawaii law that defined where the seashore boundary was.

Obviously, riparian land along the ocean is continually subject to wave action, which continually alters the affected riparian land. The Land Court decree affecting the subject parcel recognized this fact by determining the seaward boundary with reference to the "high water mark." The decree does not state the method used to determine the high water mark. The effect of said decree was to determine the title to the subject parcel bordered by the "high-water mark" and no more, which title is not in dispute. Consequently, it is difficult to recognize the applicability of res judicata as Petitioners argue.

Furthermore, the doctrine of res judicata does not apply to questions of law. *United States v. Moser*, 266

U.S. 236, 45 S. Ct. 66, 69 L. Ed. 262 (1924). The rule pronounced in *Ashford* and applied in this case raises only questions of law, and any fact, question or right distinctly adjudged in the Land Court decree in this case is not in dispute.

Respondent further contends that a substantial change in the facts precludes the application of res judicata. Erosion completely eradicated any seaward boundary line which existed when the Land Court decree was granted. With erosion, a new boundary line had to be established by the trial court in the instant case. Consequently, the factual finding of the seaward boundary as established by the Land Court decree, having now been eroded, is no longer applicable, and a fact previously adjudged is not in dispute.

CONCLUSION

Petitioners allege that constitutional questions raised by their petition are of immediate and critical importance. However, 28 U.S.C. §1257(3) requires a final judgement be rendered before a Writ of Certiorari be granted. Such final judgment has not yet been rendered.

Should this Court find that such finality has been met, the petition should still be denied since no substantial pre-existing right enjoyed by Petitioners has

been confiscated by the court below's action in this case.

Accordingly, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted.

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APPENDIX

HAWAII REVISED STATUTES

§501-63 *Appeal to supreme court.* In all cases an appeal to the supreme court shall lie from the final decree of the land court on behalf of any party aggrieved by the decree. The record on appeal may include the proceedings had in the circuit court, if any, as well as those had in the land court.